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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sutter)

In re KENNETH M. et al., Persons Coming Under the Juvenile Court Law.	
SUTTER COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. ANGEL J., Defendant and Appellant.	C046285 (Super. Ct. Nos. DPSQ035884, DPSQ035885)

APPEAL from a judgment of the Superior Court of Sutter County, Brian R. Aronson, J. Reversed with directions.

Caroline J. Todd, under appointment by the Court of Appeal for Defendant and Appellant.

Ronald S. Erickson, County Counsel and Richard Stout, Deputy County Counsel for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 976.1, this opinion is certified for publication with the exception of Part II of the DISCUSSION.

Angel J. (appellant), the mother of Kenneth M. and Katie M. (the minors), appeals from orders of the juvenile court terminating her parental rights.[1] (Welf. & Inst. Code, §§ 366.26, 395; undesignated statutory references are to the Welfare and Institutions Code.) Appellant contends the orders terminating her parental rights must be reversed because the juvenile court erred in denying her reunification services and by failing to insure compliance with the notice requirements of the Indian Child Welfare Act (ICWA). (25 U.S.C. § 1901 et seq.)[2] Agreeing with the latter claim only, we shall reverse the orders and remand the matter to the juvenile court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

On May 28, 2003, Sutter County Human Services Agency (HSA) filed original juvenile dependency petitions pursuant to section 300 on behalf of the minors. Those petitions alleged Katie had been the victim of child abuse, resulting in the minor's suffering head and eye injuries. The petitions also alleged

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[1] On June 24, 2004, this court dismissed an appeal by Kenneth M., the father of the minors, from orders terminating his parental rights for failure to file an opening brief.

[2] Appellant's claim is cognizable in this appeal because she raised an identical claim in a petition for extraordinary relief, which was denied summarily by this court. (§ 366.26, subd. (*l*)(l)(B); *Joyce G. v. Superior Court* (1995) 38 Cal.App.4th 1501, 1514.) We take judicial notice of the record in that case, *Kenneth M. et al. v. Superior Court* (Jan. 9, 2004, C045433) (nonpub. opn.), pursuant to Evidence Code sections 452, subdivision (d)(1), and 459.

there was a substantial risk Kenneth would be abused, and that domestic violence occurred in the home. At the jurisdictional hearing, the juvenile court sustained the petitions in most respects.

In a June 2003 report, the social worker noted ICWA might apply. At a September 2003 hearing, appellant told the juvenile court that her now-deceased grandfather was Indian. According to appellant's grandmother, who was at the hearing, the grandfather was Cherokee Indian, from Oklahoma, and the grandmother had his "roll card" at her home. The grandmother agreed to send a copy of the roll card to HSA. Thereafter, HSA reported it had not received any information.

Concluding that either appellant or the father of the minors had inflicted the injuries on Katie, HSA recommended the juvenile court deny appellant reunification services. According to the social worker, "[a]s KATIE suffered severe physical abuse, likely by one of her parents or possibly by someone they left KATIE in the care of, this Department does not believe that the children would be safe in the parent's [*sic*] care. As KATIE's abuser has not been identified and she suffered this abuse while in the care of her parents, this Department cannot ensure that the children would be safe with their parents. [¶] The parents have been involved with this Department for approximately five months, and have made little to no progress in addressing the issues which brought them to the attention of the Court. Neither of the parents has addressed their anger issues, co-dependency issues, substance abuse issues or

parenting needs. Other then [*sic*] visiting, the parents have shown very little motivation to reunify and clearly do not have an understanding of the severity of this Case or seriousness of KATIE's injuries. This Department does not believe that there are any services which could be put in place to ensure the safety of the children."

At the conclusion of the November 2003 dispositional hearing, the juvenile court denied appellant reunification services for Katie pursuant to section 361.5, subdivision (b)(5), and for Kenneth pursuant to subdivisions (b)(6) and (b)(7). According to the court, Katie's injuries were inflicted either by appellant or by the minors' father. The court also denied a request by appellant for a psychological evaluation of appellant. Finally, the court found reunification services would not be in the best interests of the minors.

On December 11, 2003, appellant filed a petition for extraordinary relief. In that petition, appellant argued the juvenile court erred in denying her reunification services. On January 9, 2004, this court denied the petition by order.

On October 15, 2003, HSA sent notices of the dependency proceedings by certified mail to United Keetoowah Band, Eastern Band of Cherokee Indians, and Cherokee Nation of Oklahoma. Only one of those three tribes, Eastern Band of Cherokee Indians, responded to the notices. That tribe advised HSA that neither minor was registered or eligible to register as a member of the tribe. Thereafter, in its March 2004 report, HSA concluded ICWA did not apply to the dependency proceedings.

At the March 4, 2004, section 366.26 hearing, appellant objected to the recommendation to terminate her parental rights. Instead of adoption as the permanent plan for the minors, appellant suggested the juvenile court establish a guardianship of the minors. At the conclusion of the hearing, the court found it likely the minors would be adopted and ordered appellant's parental rights terminated.

DISCUSSION

I

Appellant contends the juvenile court erred in denying her reunification services. According to appellant, the court cannot base its denial of services on subdivisions (b)(5) and (b)(6) of section 361.5, as it failed to determine that it was appellant who inflicted the injuries on Katie. Moreover, appellant argues, the court should have ordered a psychological evaluation that would have assisted the court in its decision whether to grant appellant services.

In enacting subdivision (b) of section 361.5, the Legislature has recognized that under some circumstances it may be futile to offer a parent reunification services. (*Karen S. v. Superior Court* (1999) 69 Cal.App.4th 1006, 1010.) At the time of the dispositional hearing in this case, subdivision (b) of section 361.5 provided: "Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following: [¶] . . . [¶] (5) That the child was brought within the jurisdiction of the court under subdivision (e) of

Section 300 because of the conduct of that parent or guardian. [¶] (6) That the child has been adjudicated a dependent pursuant to any subdivision of Section 300 as a result of severe sexual abuse or the infliction of severe physical harm to the child, a sibling, or a half-sibling by a parent or guardian, as defined in this subdivision, and the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent or guardian. [¶] . . . [¶] (7) That the parent is not receiving reunification services for a sibling or a half-sibling of the child pursuant to paragraph (3), (5), or (6)."

Subdivision (i) of section 361.5 states: "The court shall read into the record the basis for a finding of severe sexual abuse or the infliction of severe physical harm under paragraph (6) of subdivision (b), and shall also specify the factual findings used to determine that the provision of reunification services to the offending parent or guardian would not benefit the child."

Section 300, subdivision (e) provides for jurisdiction over the minor where: "The child is under the age of five and has suffered severe physical abuse by a parent, or by any person known by the parent, if the parent knew or reasonably should have known that the person was physically abusing the child. For the purposes of this subdivision, 'severe physical abuse' means any of the following: any single act of abuse which causes physical trauma of sufficient severity that, if left untreated, would cause permanent physical disfigurement,

permanent physical disability, or death; any single act of sexual abuse which causes significant bleeding, deep bruising, or significant external or internal swelling; or more than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness; or the willful, prolonged failure to provide adequate food. A child may not be removed from the physical custody of his or her parent or guardian on the basis of a finding of severe physical abuse unless the social worker has made an allegation of severe physical abuse pursuant to Section 332."

In this case, the juvenile court found subdivision (b)(5) of section 361.5 applied to appellant as to Katie and that subdivisions (b)(6) and (b)(7) of that section applied as to Kenneth. The court noted that, as to Katie, it had established jurisdiction pursuant to section 300, subdivision (e). The court also stated that either appellant or the father of Katie was the abusive parent.

Appellant asserts that the record does not support denial of reunification services based on section 361.5, subdivision (b)(6), as that provision requires identification of the perpetrator and subdivision (i) requires certain factual findings not made by the juvenile court here. Appellant is correct. By its express terms, subdivision (b)(6) applies to the parent who inflicted severe physical harm to the minor. Moreover, section 361.5, subdivision (i) imposes on the juvenile court the duty to state the basis for its findings. Neither of

those circumstances is present in this case. Accordingly, denial of services cannot be predicated on subdivision (b)(6). (*In re Rebekah R.* (1994) 27 Cal.App.4th 1638, 1651-1652.)

Section 300, subdivision (e), and subdivision (b)(5) of section 361.5, however, do not require identification of the perpetrator. (*In re E.H.* (2003) 108 Cal.App.4th 659, 667, 670.) Read together, those provisions permit denial of reunification services to either parent on a showing that a parent or someone known by a parent physically abused a minor. (*Id.* at p. 670.) Thus, "conduct" as it is used in section 361.5, subdivision (b)(5) refers to the parent in the household who knew or should have known of the abuse, whether or not that parent was the actual abuser. Here, as we have seen, Katie was the subject of section 361.5, subdivision (b)(5).

Under subdivision (b)(7) of section 361.5, the juvenile court may, as it did in this case, deny reunification services in connection with a sibling of the minor who was the subject of subdivision (b)(5). In this case, Katie was the minor who was the victim of severe physical abuse; the juvenile court based its denial of services as to her under subdivision (b)(5). Thereafter, the court also denied services pursuant to subdivision (b)(7) as to Kenneth. The record supports those findings. (Cf. *Karen H. v. Superior Court* (2001) 91 Cal.App.4th 501, 505.)

We reject appellant's claim that she was entitled to a psychological evaluation. Neither statute nor case law supports her claim. It is within the discretion of the juvenile court to

order such an evaluation. Here, in light of the circumstances underlying the dependency proceedings, the lack of progress made by appellant generally, and the social worker's testimony that appellant would not benefit from services, the court did not abuse its discretion in denying appellant's request for a psychological evaluation.

II

Appellant contends HSA violated the notice requirements of ICWA because there is no evidence it sent the three Cherokee Indian tribes information pertaining to the great-grandfather of the minors. According to appellant, HSA possessed the name of the great-grandfather because he had been identified by the great-grandmother at a hearing. Moreover, appellant asserts HSA failed to mail the notices it sent by registered or certified mail, return receipt requested, and also failed to include copies of the dependency petitions with the notices, as required by law. Appellant claims that failure to provide this information is prejudicial error.

ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. (25 U.S.C. §§ 1901, 1902, 1903(l), 1911(c), 1912.) If, after the petition is filed, the juvenile court "knows or has reason to know that an Indian child is involved," notice of the pending proceeding and the right to intervene must be sent by registered or certified mail with return receipt requested to the Indian child's tribe or the Bureau of Indian

Affairs (BIA) if the tribal affiliation is not known. (25 U.S.C. § 1912; Cal. Rules of Court, rule 1439(f).) The "'Indian child's tribe' means (a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts." (25 U.S.C. § 1903(5).) Thus, the court is required to notify all tribes which potentially qualify as the Indian child's tribe in order to permit each tribe to assert its claim and to allow the court to consider the comparative interest of each tribe in the welfare of the child. (Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed.Reg. 67586-67587 (Nov. 26, 1979) B.2, Commentary (Guidelines).) The failure to comply with the notice provisions and determine whether ICWA applies is prejudicial error. (*In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1424; see also *In re Desiree F.* (2000) 83 Cal.App.4th 460, 472.)

In this case, HSA obtained information that appellant had Cherokee Indian heritage in her family. Thereafter, according to HSA, it notified three tribal units; only one responded. Correspondence contained in the record reflects determinations by that tribe that, based on the information provided, the minors were not "Indian" within the meaning of ICWA.

The Federal Register lists those Indian tribal entities eligible to receive services under federal law. That list contains three Cherokee entities: Cherokee Nation of Oklahoma, Eastern Band of Cherokee Indians of North Carolina, and United

Keetoowah Band of Cherokee Indians of Oklahoma. (67 Fed.Reg. 46328 (July 12, 2002).)

Notice under ICWA must include the following information, "if known": the name of the child; the child's birth date and birth place; the name of the tribe in which the child is enrolled or may be eligible for enrollment; names of the child's mother, father, grandparents and great-grandparents or Indian custodians, including maiden, married, and former names or aliases, as well as their birthdates, places of birth and death, tribal enrollment numbers, and current and former addresses; and a copy of the petition. (25 C.F.R. § 23.11(a) & (d); 25 U.S.C. § 1952.)

The record in this case contains notices to BIA from HSA on form "SOC 319" and proofs of service to three Cherokee tribes. Form "SOC 319," issued by the State Health and Welfare Agency, is designed to provide notice in compliance with ICWA. (*In re L.B.* (2003) 110 Cal.App.4th 1420, 1425.) However, we think another form, form "SOC 318," also should be used. Both forms provide that a copy of the dependency petition shall accompany the forms. (*Ibid.*) Moreover, form "SOC 318" directs that information pertaining to grandparents and great-grandparents should be provided.[3] (*In re C.D.* (2003) 110 Cal.App.4th 214, 225.)

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[3] The record contains no notices sent on form "SOC 318."

At the October 30, 2003, hearing, the juvenile court referred to the receipt of form "SOC 318." However, there is no other indication in the record that that form was sent to any of the Cherokee tribes, or that they received the great-grandfather's name in any other manner. Moreover, the notices sent were not sent return receipt requested. Finally, the proof of service leaves blank the box indicating that a copy of the dependency petition was included with the notice. In all of these respects, HSA erred. (*In re D.T.* (2003) 113 Cal.App.4th 80, 86, 87.)

We may presume HSA was not aware of *all* potential items of information. However, as to information such as the name of a great-grandparent of the minors, information of which the record indicates it was aware, and the dependency petition, we cannot countenance the omission of such significant documentation from notices sent to the Cherokee tribes. Moreover, as two of the tribes here did not respond to the notices, using the required form of mail delivery is especially important to verify proper receipt of the notices. On this record, the failure of HSA to perform its duty constitutes prejudicial error. Reversal is required. (*In re Jennifer A.* (2002) 103 Cal.App.4th 692, 705.)

"[O]ne of the primary purposes of giving notice to the tribe is to enable the tribe to determine whether the child involved in the proceedings is an Indian child. [Citation.]" (*In re Desiree F., supra,* 83 Cal.App.4th 460, 470.) Notice is meaningless if insufficient information is provided to assist the tribes in making this determination. In this case, where

incomplete forms are used, "it is little wonder the responses received were that the information was insufficient to make a determination or that the minors were not registered or eligible to register [as tribal members]." (*In re D.T., supra,* 113 Cal.App.4th 80, 86.) We conclude the notices provided to the tribes were insufficient.

DISPOSITION

The orders terminating appellant's parental rights and selecting adoption as the permanent plan for the minors are reversed, and the matter is remanded for the limited purpose of providing notice to all three Cherokee tribes, in compliance with Indian Child Welfare Act requirements as explained in the Guidelines for State Courts.[4]

If, after proper notice, the Cherokee tribes either do not respond or determine that the minors are not Indian children with respect to the Cherokee tribes, the juvenile court shall reinstate the orders.

However, if any of the tribes determine the minors are Indian children with respect to the Cherokee tribes, the juvenile court shall hold a new dispositional hearing and a new

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[4] Specifically, as stated in Guidelines for State Courts, section B.2(b), "The court shall send the notice specified . . . to each such tribe. The notice shall specify the other tribe or tribes that are being considered as the child's tribe and invite each tribe's views on which tribe shall be so designated." (Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed.Reg. 67586-67587 (Nov. 26, 1979).)

Welfare and Institutions Code section 366.26 hearing in conformance with all provisions of the Indian Child Welfare Act.

SIMS, Acting P.J.

We concur:

RAYE, J.

BUTZ, J.